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No. 87-2040

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

STATE OF MISSOURI, *et al.*,

Petitioners,

vs.

ROCKWOOD SCHOOL DISTRICT, *et al.*,

and

RITENOUR SCHOOL DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT ROCKWOOD SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The beginning of the Petitioner's presentation to this Court, which states that this "is not a case about desegregation" (Pet. at 1), is unfathomable. The issue presented by the State of Missouri ("State") goes to the heart of the St. Louis School desegregation case which began 16 years ago and has painstakingly progressed ever since. If the position of the State is accepted, it would most likely trigger the withdrawal of the twenty-three (23) St. Louis County ("County") school districts from the desegregation plan under which the County districts volunteered to accept black transfer students from the City of St. Louis ("City") school district. The reason such withdrawal would likely occur is because such voluntary participation is dependent upon the express condition that adequate funding be provided pursuant to the Settlement Agreement (Section X) which created the plan. (For Section X, see Pet. Appx. A218 et seq.).

Subsequent to such statement by Petitioner, its Statement of the Case proceeds to depict an incomplete picture of this desegregation case, especially relative to the questions presented. The Statement of the Case proffered by fellow Respondent Ritenour School District ("Ritenour") in its Brief in Opposition is much more germane to the issues at hand, and this Respondent accepts Ritenour's statement as much more appropriate herein. In an effort at brevity and avoidance of duplication of Ritenour's statement, this Respondent shall limit its statement to general highlights of this complex case and particular facts relevant to this Respondent and the proceedings leading to the opinion of the Eighth Circuit from which the Petition herein arises.

A.

A Partial History of the St. Louis Desegregation Case

In 1980, the State, along with the St. Louis City School Board ("City Board"), was found to be the primary constitutional violator relative to the racial segregation in the City schools. *Adams v. United States,* 620 F.2d 1277 (8th Cir. 1980), *cert. denied,* 449 U.S. 826 (1980). The case was remanded to the District Court to "take those steps necessary to bring about an integrated school system" and "seek the cooperation of" the suburban school districts of St. Louis County to perhaps develop and implement "a comprehensive program of exchanging and transferring students with the suburban school districts." *Adams,* 620 F.2d at 1295 and 1296. The State did not file a certiorari petition relative to this decision. This Respondent Rockwood School District ("Rockwood"), like all of the other suburban school districts, was not a participant in the desegregation case at this point. Neither Rockwood nor any other suburban school district has *ever* been found liable for any constitutional violation in the St. Louis desegregation case.

On such remand, the District Court held that the State, as primary constitutional wrongdoer, must "affirmatively participate in remedial efforts . . . including the provision of funding, to the extent necessary, for the desegregation efforts ordered by the Court." *Liddell v. Board of Education,* 491 F.Supp. 351, 360 (E.D.Mo. 1980). Finding the State "jointly and severally liable with the Defendant Board for the costs," the District Court ordered the State and City Board to attempt to work with the suburban

school districts to develop "a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis." *Liddell*, 491 F.Supp. at 357 and 353. In its appeal to the Eighth Circuit, the State objected to its funding obligations in general and, specifically, for the suburban transfer program. The Eighth Circuit rejected the State's funding arguments stating that such issues were specifically decided previously in *Adams*, and the State failed to thereupon take those issues up to this Court. *Liddell v. Board of Education*, 667 F.2d 643, 654 (8th Cir. 1981) ("*Liddell II*").

In its first certiorari petition to this Court, the State challenged its funding obligation as confirmed in *Liddell II* and as set forth in *Adams*. That Petition, similar in nature to the instant Petition, was denied. 451 U.S. 902 (1981).

Following *Liddell II*, the District Court entered an order specifically authorizing the City-to-County transfers and requiring the State to pay the costs thereof. The State again appealed such finding, and the Eighth Circuit again rejected the State's funding objection, as the matter had been previously and extensively litigated, settled and established by *Adams*, *Liddell II*, and this Court's denial of certiorari review. *Liddell v. Board of Education*, 677 F.2d 626 (8th Cir. 1982) ("*Liddell V*"). Again the State applied to this Court for review, which application was similar to the petition previously denied in 1981 and the instant Petition. Likewise, this Court denied that petition for certiorari. 459 U.S. 877 (1982).

Shortly thereafter, following intense negotiations and drafting sessions in which the State, the Plaintiffs, the City Board and all of the suburban school districts participated, there was submitted to the District Court a Settlement Agreement executed by all of the said participants except the State, the Settlement Agreement being contained in Petitioner's Appendix at A135, *et seq.* In response to the Eighth Circuit and District Court directions discussed previously, the Settlement Agreement established a transfer plan whereby the suburban school districts agreed to accept and educate those black students from the City who elected to transfer to the County. As the suburban districts have never been found liable for any wrongdoing, and as their agreement to accept City students was to assist the State and City Board to remedy the constitutional violations committed by the State and City Board, such agreement and participation was and is strictly contingent upon the suburban districts receiving full reimbursement of their costs which are incurred as a result of acceptance of the City transfer students, as set forth in Section X of the Settlement Agreement. (Pet. Appx. A218 *et seq.*). In approving the Settlement Agreement, the District Court ordered the State to fund all of the costs of the suburban transfer program.

The State again appealed, and the Eighth Circuit again rejected the State's challenge of its funding obligation. *Liddell v. State of Missouri,* 731 F.2d 1294 (8th Cir. 1984) (*"Liddell VII"*). In so doing, the Eighth Circuit examined extensively the same Eleventh Amendment issue which the State argues in this Petition, and flatly rejected the same. *Liddell VII,* 731 F.2d at 1308. Filing its third certiorari petition, the State again sought review of the

repeated rejection of the State's funding argument in *Liddell VII*, which petition was again remarkably similar in most respects to the instant Petition. Again, this Court denied certiorari. 469 U.S. 816 (1984).

B.

Rockwood's Capital Budget Requests and the Decisions Below

One portion of the settlement Agreement provides for the payment of certain capital costs incurred by the suburban districts as a result of the need for additional space due to the influx of transfer students from the City. Obviously, as the incoming City transfer students increase the student population of a suburban school district, the number of classrooms in that suburban school district would need to be increased, either by reopening closed classrooms or building new ones if the district has no closed classrooms. The provision in question, contained in Section X.B.3. of the Settlement Agreement, provides funding for "one-time extraordinary costs (other than hiring of personnel) such as the costs associated with reopening a closed school." (Pet. Appx. A220).

In St. Louis County, there were and are basically two types of suburban school districts, either expanding districts or contracting districts. The expanding districts are located in the outlying, formerly rural, partially undeveloped but now developing areas of the County. New housing developments cause increased population, generally younger child-rearing residents, and a resulting continual increase in the student population. The contracting districts are generally located in areas in closer proximity to the City, and are more established, fully devel-

oped and with little or no new housing. Such areas generally experience less resident mobility and, therefore, a gradually aging population with a declining number of students. As a result of these changes in student population, expanding districts generally found themselves at capacity in newer buildings at or shortly after the inception of the City-to-County transfer plan while contracting districts generally were at or under capacity in older buildings with closed classrooms and schools in their district. Therefore, with additional City students coming into the suburban district, an expanding district would need to build more new buildings, and a declining district could reopen closed buildings.

Being one of the outermost and most rapidly expanding suburban districts, soon after the commencement of the voluntary transfer program under the Settlement Agreement it was necessary for Rockwood to file a budget request in the District Court for construction of additional classrooms. It was the first such request filed in the case. Rockwood's request followed the proper budgetary procedure established by the District Court, in which the State participated, and in 1984 the District Court entered an order approving Rockwood's capital budget request and directing the State to fund the same. In complete compliance with said order, the State paid Rockwood the cost of such capital improvements. The State did not appeal or otherwise object to such funding. With said funding, Rockwood proceeded to construct the new classrooms.

The student population of Rockwood continued to expand and Rockwood continued to accept a greater num-

ber of City transfer students into its district. As a result, in 1986 it was necessary for Rockwood to file a second capital budget request in the District Court, this time for construction of ten new classrooms to be added to existing school buildings. Prior to completion of the normal budgetary process, the District Court entered an order which gave rise to Rockwood's appeal to the Eighth Circuit, and the State's instant Petition for Certiorari. The order of the District Court, entered August 25, 1986, denied Rockwood's budget request on the basis of an interpretation of the language of Section X.B.3., holding "one-time extraordinary costs" to mean that a suburban school district could apply only once for capital costs.

Rockwood appealed to the Eighth Circuit contending that "one-time" clearly describes the *type* of costs and did not, and was never intended, to limit the number of times such an application could be made. Throughout the briefing and argument of the appeal by both Rockwood and the State, the issue on appeal was strictly limited to the meaning of the words "one-time" in the Settlement Agreement. Prior to the rendering of the Eighth Circuit opinion below, *the State never raised an Eleventh Amendment argument*, in the District Court or the Eighth Circuit, relative to Rockwood's capital budget request. The Eighth Circuit reversed the District Court's denial of Rockwood's request, holding that multiple capital budget requests were allowed and provided for under the clear language of the Settlement Agreement, and remanded to the District Court to proceed on the request, which the District Court has subsequently allowed in full. In its motion for rehearing and rehearing en banc before the Eighth Circuit, the State raised *for the first time* its con-

tention that the payment of Rockwood's budget request was barred by the Eleventh Amendment. The State's motion for rehearing was denied by the Eighth Circuit.

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REASONS FOR DENYING THE WRIT

I.

The State Failed to Properly Present Its Eleventh Amendment Argument to the Courts Below

For whatever reason, the State failed to present to the District Court any argument or objection to the capital budget request of Rockwood based upon the Eleventh Amendment to the United States Constitution. Instead, the State chose to be silent relative to the Eleventh Amendment and allowed the District Court to base the denial of Rockwood's request solely upon an interpretation of the language of the Settlement Agreement, an argument which the Eighth Circuit found to be incorrect.

Before the Eighth Circuit, the State again was *totally* silent as to the Eleventh Amendment issues in its responsive brief and in its oral argument relative to the Rockwood request. It was only *after* the issuance of the Eighth Circuit's opinion that the State *first* raised the issue in its motion for rehearing, that the Rockwood request was barred by the Eleventh Amendment. In fact, the Eighth Circuit opinion below specifically held that there was no Eleventh Amendment bar to a small group of costs requested by the other Respondent herein, Ritenour. *Lid-*

dell v. Board of Education, 839 F.2d 400, 404 (8th Cir. 1988). The motion for rehearing was denied.

Perhaps more importantly, when the District Court granted Rockwood's first capital budget request in 1984, the State made no objection thereto, based upon the Eleventh Amendment or any other basis. The State instead simply supplied the funding for that request as ordered by the District Court. By so doing, the State consented to and acquiesced in its obligation to fund capital budget requests of the suburban school districts in general, and Rockwood in particular. The State thereby waived any Eleventh Amendment argument, if such an argument could have existed at all.

This Court is hardly the proper forum for any party to address substantive issues, such as those presented by the State herein, for the first time. Such issues must be fully presented and litigated in the courts below before being presented to this Court. As the Petitioner had not one but two opportunities to present the issues below, and in effect waived the issues at its first opportunity four years ago, this Respondent respectfully suggests that the instant Petition should be summarily denied.

II.

The Time for the State to Attack Its Funding Obligation has Expired and the Issue has Long Been Resolved

Sixteen years ago this case began. Eight years ago, the State, having been found a primary constitutional violator, was ordered, in conjunction with the City Board, to remedy such violation and provide funding for such remedy in general, and the suburban transfer program in par-

ticular. What has followed has included thousands of proceedings in the District Court, including hundreds of funding orders directed to the State, and at least fifteen appeals to the Eighth Circuit. In addition, the State has petitioned this Court for certiorari on three occasions, specifically seeking review of its funding duty, and on each occasion has been denied. In response to the repeated appeals by the State to the Eighth Circuit seeking relief from its duty to fund, the Eighth Circuit has repeatedly stated that since *Adams v. United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980), the issue had been thoroughly argued, considered and decided adverse to the position of the State. As it was the clear law of the case, the State was precluded from rearguing and relitigating the matter as the issue was conclusively resolved.

The waiver and acquiescence by the State relative to Rockwood's first capital budget request in 1984 is but one more indication, particularly appropriate for Rockwood, that the State is too late to present its Eleventh Amendment argument to this Court. In fact, it is much more than a simple matter of missed opportunity on the part of the State, since the previous three certiorari petitions filed by the State herein have each squarely presented to this Court the State's objections to its duty to fund.

The practical aspects of the potential effect of the State's argument, although ancillary to the legal procedural barriers to the instant Petition, are nevertheless equally significant. In a case where millions of dollars of funds have already been expended to remedy the segregation problem in the City schools, by the assistance of the

suburban schools for the past five years, and for a longer time period in the City schools themselves, an abrupt cessation of State funding at this point would be catastrophic to the desegregation plan in St. Louis. Transfers of City children to the County districts would end entirely and, presumably, those children (more than 12,000 in number), many of whom have attended their new "home" County district for several years, would be abruptly thrust back into the City school district from whence they came. Not only would such an onslaught of children be an immediate problem for the City Schools, but withdrawal of State funding to the City Board would effectively cripple the City's desegregation efforts. The St. Louis desegregation program has been established and set on its course to remedy a wrong, it should not be derailed by the State in this fashion.

III.

The Decision Below is Not in Conflict with the Decision of Any Other Federal Court of Appeals

The State contends that the decision below is in conflict with a decision of the Sixth Circuit, namely *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee,* 836 F.2d 986 (6th Cir. 1987), and, therefore, should be reviewed by this Court. Such contention is simply inaccurate—*Kelley* is clearly distinguishable, in crucial aspects, from this case.

First and foremost, in *Kelley*, the Metropolitan Board of Education of Nashville and Davidson County ("Metropolitan Board") was first found to have violated the Constitution by its segregation and ordered to remedy the problem, and only *thereafter* brought the State of Ten-

nessee into the case to help fund the remedy. The State of Tennessee was *not* subject to that original remedial order. In fact, the Sixth Circuit was unable to find that the State was guilty of any wrongdoing (*Id.* at 993) or was a constitutional violator (*Id.* at 995). In the instant case, as discussed in more detail hereinabove, the State and the City Board were *originally* and *together* found to be constitutional violators and were *together* ordered to remedy the violation. After the State participated in the process which ultimately resulted in development of that remedy, the State was directed to implement and fund portions of that remedy.

Another important distinction between *Kelley* and the instant case, likewise fatal to the State's contention, is the difference in the recipients of the funding in the two situations. In *Kelley*, it was the urban school district who was originally adjudicated the only constitutional violator and in whose district the violations occurred. In the instant case, it is suburban school districts, not adjudicated violators, who have agreed to assist in the remedy of the State's constitutional violation which occurred outside of the recipient suburban school district, to-wit: in the school district of the City of St. Louis.

Finally, the State's attempt to characterize its funding obligation in the instant case as a "naked order to pay" is simply inaccurate. As described in detail hereinabove and in Respondent Ritenour's brief herein, from the beginning the State was clearly found to be guilty of constitutional violations and was ordered "to affirmatively participate in remedial efforts . . . including the provision of funding, to the extent necessary, for the desegregation efforts ordered by the Court." *Liddell v. Board of Edu-*

cation, 491 F.Supp. 351, 360 (E.D.Mo. 1980). The State itself, in its previous certiorari petitions to this Court has taken a position contradictory to its "naked order to pay" theory presented for the first time in the instant Petition. In the 1982 petition, the State challenged the decision "ordering the State to participate in an inter-district remedy" (Pet. No. 81-2022 at p. 10) (*cert. denied*, 459 U.S. 877). Again in 1984, the State Petition posed the question of whether "a federal court may require a state to *implement* a multi-district remedy for segregation." (Pet. No. 83-1721 at i) (*cert. denied*, 469 U.S. 816). The State has obviously been ordered to do much more than supply funds.

IV.

The Decision Below is Consistent with Previous Decisions of This Court, and the Questions Presented Have Already Been Rejected by This Court

The State's Petition attempts to establish that the decision below is contrary to "controlling decisions" of this Court relative to the Eleventh Amendment. Curiously, the State fails during the course of that argument to mention this Court's opinion in *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). Perhaps such omission by the State is not surprising, as the decision below is squarely supported by and consistent with *Milliken II*.

Milliken II has not only been cited repeatedly by the Eighth Circuit and the District Court below throughout the course of this desegregation case, but has also been strictly applied and followed by the courts below. The repeated reference to *Milliken II* by the courts below has been particularly appropriate because of the similar circumstances

in *Milliken II* and in this case, i.e. in both instances a State, found liable in a school desegregation case, has been ordered to fund the remedial costs thereof. In both instances, such funding was found not to violate the Eleventh Amendment. The instant case is even farther removed from violating the Eleventh Amendment than the circumstances of *Milliken II* in that the recipient of the state funding in *Milliken II* was an adjudicated constitutional violator (the Detroit School Board) whereas the recipient herein is not (Rockwood).

Edelman v. Jordan, 415 U.S. 651 (1974) (*"Edelman"*), which was cited by Petitioner, is patently distinguishable from the instant case for Eleventh Amendment purposes in that in *Edelman* the plaintiffs receiving funds were individual citizens seeking money damages for themselves. In the instant case, the Plaintiffs are black students from the City seeking a remedy to school segregation rather than money damages for themselves, and the State funding is going to the suburban school districts assisting the State in its remedial duties. *See Milliken II*, 433 U.S. 267, 290 n. 22 (1977). Far from being inconsistent with the instant case, *Edelman* reaffirms the prospective-compliance exception applicable in the instant case and which was established in *Ex parte Young*, 209 U.S. 123 (1908).

The State's contention, that funding orders directed to the State in favor of one of its own political subdivisions violate the Eleventh Amendment, has been rejected repeatedly by this Court. It was rejected expressly in *Milliken II* and by implication from this Court's repeated denials of the State's previous certiorari petitions herein.

V.

The Decision Below Does Not Violate the Eleventh Amendment

Lost in the lengthy argument of the Petitioner herein is a simple fact—*the decision below did not order any funding to Rockwood by the State.* Relative to Rockwood, the decision below merely held that pursuant to the clear language of the Settlement Agreement the District Court erred in barring the *application* of Rockwood for a second capital budget request. The Eighth Circuit remanded the matter to the District Court for further consideration of Rockwood's request. Without an order to fund, there can be no possible violation of the Eleventh Amendment as argued by the State.

Also, as has been argued hereinabove, the directives against the State in the St. Louis desegregation case have been remedial, and not purely financial. No money damages have gone from the State to the Plaintiffs. Rockwood, the potential recipient of the State funds, is not a party-plaintiff with respect to the State and is not a constitutional violator. Under the clear holding in *Milliken II* and the cases which have followed, and for the foregoing reasons, the decision below does not violate the Eleventh Amendment to the U.S. Constitution.

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CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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